MOTION FILED
DEC 30 1981

No. 80-1417

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

MARK J. MILLS, MICHAEL GILL AND
WILLIAM MALAMUD,

Petitioners,

v.

RUBIE ROGERS, ABLE BOLDEN, BETTY BYBEL,
JAMES COLLERAN, DONNA HUNT,
WILLIE WADSWORTH, AND HAROLD WARNER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF MENTAL HEALTH ADVOCACY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

STANLEY C. VAN NESS
PUBLIC ADVOCATE
Department of the
Public Advocate
520 East State Street
Trenton, N. J. 08625
(609) 292-1780
Attorney for
Amicus Curiae

MICHAEL L. PERLIN
Director
John J. Ensminger
Division of Mental
Health Advocacy

LAW REPRINTS EDITOR'S NOTE: THE MOTION OF THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF OUT OF TIME WAS DENIED BY THE COURT. IT IS INCLUDED HERE IN THE INTEREST OF SUPPLYING THE COMPLETE RECORD.

TABLE OF CONTENTS

	PAGE
MOTION OF THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE	1
BRIEF OF THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE	9
INTEREST OF AMICUS CURIAE	9
STATEMENT OF PROCEEDINGS	13
SUMMARY OF ARGUMENT	14
ARGUMENT	17
I. THE DANGERS OF ANTIPSYCHOTIC DRUGS AS USED IN THE PUBLIC HOSPITAL SETTING AND THE EFFECTS OF DUR PROCESS ON THEIR USE HAVE BEEN AMONG THE PRINCIPAL CONCERNS OF AMICUS, THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE	17
A. The Division Of Mental Health Advocacy Is Uniquely Qualified In This Area	17
B. Amicus Can Document The Inherent Dangers Of The Types Of Drugs Involved In Mills As Used In Public Hospital Settings Under Conditions of Confinement Strikingly Similar To Respondents'	21

	PAGE
1. Similar persons are at risk	23
2. Similar types of institutions	25
3. Similar medications used	26
4. Similar side-effects	34
II. NEW JERSEY'S MEDICATION REVIEW PROCEDURES PROTECT PATIENTS' CONSTITUTIONAL RIGHTS WHILE TAKING INTO CONSIDERATION FISCAL REALITIES AND ADMINISTRATIVE NECESSITIES	36
A. New Jersey Has Had Almost Two Years Experience With An Effective And Well-Administered Medication-Review System	36
B. The New Jersey Experience Belies Predictions Of Administrative And Medical Difficulties Resulting From Medication-Review Hearings	40
C. Drug Inquiry Hearings Are Not The "Time-Consuming Procedural Minuets" Feared By The Parham Court	57
CONCLUSION	72
AFFIDAVIT OF ARTHUR ROSENBERG, ESQ. Appendix A	1a
AFFIDAVIT OF PATRICK REILLY Appendix B	1b
AFFIDAVIT OF CRAIG RODINE Appendix C	1c

TABLE OF CASES AND AUTHORITIES

Cases	PAGE
Addington v. Texas, 441 U.S. 418 (1979)	26,68
Brewster v. Dukakis, 520 F. Supp. 882 (D. Mass. 1981)	40,43
Cospito v. Califano, 89 F.R.D. 374 (D.N.J. 1981)	25
Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980)	12,27
Davis v. Hubbard, Order Approving Plan for Independent Psychiatric Review of Disputed Psychiatric/Medication Decisions, No. C 73-205 (N.D. Ohio, May 18, 1981) reported at 15 Clearinghouse Rev. 528 (1981)	12
Doe v. Klein, 1 Ment. Dis. L. Rptr. 475 (N.J. Super. Ct. Law Div. 1977)	20,21
Falter v. Veterans Administration, 502 F. Supp. 1178 (D.N.J. 1980)	20,21
Goedecke v. State Dept. of Inst'ns, 603 P.2 123 (Col. Sup. Ct. 1979)	27
Goodwin v. Shapiro, Docket #80-2828 (D.N.J. 1981)	20,21
Greenwood v. United States, 350 U.S. 366 (1956)	61
Herbstmann v. Eastman Kodak Co., 68 N.J. 1, 342 A. 2d 181 (1975)	29

	PAGE
Huddell v. Levin, 537 F. 2d 726 (3 Cir. 1976)	29
Hutto v. Finney, 437 U.S. 678 (1978)	26
In re Boyd, 403 A. 2d 744 (D.C. Ct. App. 1974)	27
In re C.B., Docket #AM 774-75 (N.J. App. Div. 1976)	20,21
In re G.G., Docket #MECC 164-75 (N.J. Cty. Ct. 1976)	20,21
In re Grady, 85 N.J. 235, 426 A. 2d 467 (1981)	31,33
In re Guardianship of Roe, 421 N.E. 2d 40 (Mass. Sup. Jud. Ct. 1981)	27
In re K.K.B., 609 P. 2d 747 (Okla. Sup. Ct. 1980)	27
In re Kolodka, Docket #ESCC 395-75 (N.J. Cty. Ct. 1975)	20,21
In re W.S., 152 N.J. Super. 298, 377 A. 2d 969 (Cty. Ct. 1977)	20,31
Kaimowitz v. Michican Department of Mental Health, Civ. No. 73-19434 (Mich. Wayne Cty. Cir. Ct. 1973)	31
Mathews v. Eldridge, 424 U.S. 319 (1976)	68,69
McAuliffe v. Carlson, 377 F. Supp. 896 (D. Conn. 1974) supp. order rev'd on grds. 520 F. 2d 1305 (2 Cir. 1975), cert. den. 427 U.S. 911 (1976)	64

	PAGE
Mt. Laurel Tp . v. Public Advocate of N.J., 83 N.J. 522, 416 A. 2d 886 (1980)	18
O'Connor v. Donaldson, 422 U.S. 563 (1975)	61
Parham v. J.R., 442 U.S. 584 (1979)	16,57,59,60,61, 62,64,65,70
Pennhurst State School v. Halderman, 451 U.S.1 (1981)	25
Procunier v. Martinez, 416 U.S. 396 (1974)	26
Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978),	4,10,18
Rennie v. Klein, 476 F. Supp. 1294 (D.N.J. 1979)	4,5,10,25,35,36,41, 43,45,52,56,58,64, 72, 2a
Rennie v. Klein, 653 F. 2d 836 (3 Cir. 1981), petition for cert. filed October 7, 1981 (No. 81-5534), in tandem motion den. 50 U.S.L.W. 3446 (U.S. Dec. 1, 1981)	4,6,7,8,10, 26,35,41,63,67
Richardson v. Perales, 402 U.S. 389 (1971)	68
Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979)	25,27,32,70
Rogers v. Okin, 634 F. 2d 650 (1 Cir. 1980), cert. granted sub. nom Mills v. Rogers -- U.S. --, 101 S. Ct. 1972 (1981)	6,7,8,12,21, 22,23
Romeo v. Youngberg, 644 F. 2d 147 (3 Cir. 1980), cert. granted -- U.S. --, 101 S. Ct. 3212 (1981)	23

	PAGE
San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973)	24
Schindenwolf v. Klein, 5 Ment. Dis. L. Rptr. 60 (N.J. Super. Ct., Law Div. 1980)	20,21
Scott v. Plante, 532 F. 2d 939 (3 Cir. 1976)	28
Scott v. Plante, 641 F. 2d 117 (3 Cir. 1981) petition for cert. filed -- U.S. -- 49 U.S.L.W. 3887 (U.S. May 26, 1981)	23
State v. Krol, 68 N.J. 236, 344 A. 2d 289 (1975)	69
U.S. v. Carolene Products Co., 304 U.S. 144 (1935)	24
Vitek v. Jones, 445 U.S. 480 (1980)	26,69
STATUTES AND REGULATIONS	
42 U.S.C.A. §2153e	29
42 U.S.C.A. §2156	29
42 U.S.C.A. §2241	29
42 U.S.C.A. §9501(1)(E)	31
N.J.S.A. 30:4-24.2c	64
N.J.S.A. 30:4-24.2d(2)	31
N.J.S.A. 52:27E-1 et seq.	18

	PAGE
N.J.S.A. 52:27E-24	2,17
N.J.S.A. 52:27E-25	18
N.J.A.C. 7:28-15.1 et seq.	30
N.J.A.C. 7:28-24.1 et seq.	30
N.J. Ct. R. 4:74-7	19,50

OTHER AUTHORITIES

Appelbaum and Roth, "Clinical Issues in the Assessment of Competency," 138 Am. J. Psych. 1462 (1981)	64
Brooks, "The Constitutional Right to Refuse Antipsychotic Medication," 8 Bull. Am. Acad. Psych. & L. 179 (1980).	27,31,38,43, 46,47,48,52, 54,66
Cumming and Goyer, "Therapeutic Consequences of the Involuntary Commitment Process," 1 Am. J. Forens. Psych. 37 (1979)	50
"Developments in the Law -- Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190 (1974)	63
Ellenberger, "Psychiatry from Ancient to Modern Times," in American Handbook of Psychiatry (Arieta ed. 1974)	17
Ensminger & Liguori, "The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential," 6 J. Psych. & L. 5 (1978)	50,65
Goffman, Asylums (1961)	25

	PAGE
Hare-Mustin, et al., "Rights of Clients, Responsibilities of Therapists," 34 Am. Psychol. 3 (1979)	46
Heffner, "Legislative Oversight: An Analysis of L. 1974, Chapter 27, Department of the Public Advocate Act," 1 Seton Hall Legis. J. 76 (1976)	18
Herr, Advocacy Under the Developmental Disabilities Act (1976)	71
Mora, "Recent Psychiatric Developments (Since 1939)," in American Handbook of Psychiatry (Arieta ed. 1974)	30,33
Perlin, "The Right to Refuse Treatment in New Jersey," 6 Psych. Annals 300 (1976)	20
Pressler, Current N.J. Court Rules, Comment to R. 4:74-4 (1982)	50
Prigg, "Abnormalities in Newborn Babies," 224 Practitioner 309 (1980)	33
Restatement (Second) of Torts	29
Restatement (Second) of Torts, Tentative Draft No. 7 (1977)	29
Ross, et al., "'On-Off Syndrome' Treated With Lithium Carbonate: A Case Report," 138 Am. J. Psych. 1626 (1981)	34

	PAGE
Sadoff, "Basic Facts About Mental Illness," in Legal Rights of Mentally Disabled Persons (Friedman ed. 1979)	30
Sadoff, Legal Issues in the Care and Treatment of Psychiatric Patients: A Guide for the Mental Health Practitioner (1982)	56
Sullivan, "Peer Review and PSRO in American Psychiatry," 49 Psych. Q. 331 (1971)	46
Task Panel Reports Submitted to the President's Commission on Mental Health (1978)	31,71
Van Ness and Perlin, "Mental Health Advocacy -- the New Jersey Experience," in Mental Health Advocacy: An Emerging Force in Consumers' Rights (Kopolow and Bloom eds. 1978)	20,58
Wald, "Basic Personal and Civil Rights," in Kindred, et al., The Mentally Retarded Citizen and the Law 3 (1976)	70
Zlotnick, "First Do No Harm: Least Restrictive Alternative Analysis and the Right of Mental Patients to Refuse Treatment," 83 W. Va. L. Rev. 375 (1981)	52

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-1417

MARK J. MILLS, MICHAEL GILL AND
WILLIAM MALAMUD,

Petitioners,

v.

RUBIE ROGERS, ABLE BOLDEN, BETTY BYBEL,
JAMES COLLERAN, DONNA HUNT,
WILLIE WADSWORTH, AND HAROLD WARNER,

Respondents.

On Writ of Certiorari to the United
States Court of Appeals for the
First Circuit

MOTION OF THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF MENTAL HEALTH ADVOCACY FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The New Jersey Department of the Public Advocate, Division of Mental Health Advocacy,[1]

---

[1]The Division of Mental Health Advocacy, a state agency within the New Jersey Department of the Public Advocate, created by the

respectfully moves this Court for leave to file the accompanying brief amicus curiae. The Division seeks permission to participate as amicus in this case in order to share with this Court its general experience and insights dealing with the use and effects of antipsychotic drugs on patients in New Jersey state mental hospitals, all aspects of which bear striking similarity to the drugs, patients and hospital situations at issue in this case. In addition, it

---

New Jersey legislature in 1974, has two primary statutory functions: It "may provide ... legal representation... for any indigent mental hospital admittee's admission to, retention in, or release from confinement in... [a mental hospital or a similar facility]," N.J.S.A. 52:27E-24, and it "may represent the interests of indigent mental hospital admittees in such disputes and litigation, as will...best advance [their] interests as a class on an issue of general application to them," N.J.S.A. 52:27E-24.

wishes to bring before this Court an up-to-the-minute analysis of the actual operation and cost efficiency of the due process system relating to the use of these drugs which has been in effect in New Jersey since 1978, the longest duration of any such system in the United States. The Division's views, based on its general experience with these drugs and the record of the New Jersey due process system, are unavailable from any other source in this case.

This Division's proposed amicus brief is intended to be filed in support of respondents in this case who have consented to the filing of this brief and whose consent is being filed herewith. The Mills petitioners have declined to consent. The absence of that consent is one basis for the filing of this motion. In addition, as a result of the unusual combination of circumstances described more fully below,

the Division must also respectfully request this Court for leave to file its brief amicus curiae at this time even though the normal time limits for such a filing under Rule 36 have expired.

The Division has been involved in representing mental patients since 1974. Since its formation, the Division has been involved in treatment issues including questions involving the use of psychotropic medication. In particular, the Division has acted as counsel to the patient-petitioners in Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978), suppl. 476 F. Supp. 1294 (D.N.J. 1979), mod. 653 F. 2d 836 (3 Cir. 1981), cert. petit. filed October 7, 1981 (No. 81-5534), in tandem motion den. 50 U.S.L.W. 3446 (1981), a case involving some of the same issues as this case. In that case the district court ordered the implementation of a due process system

in five New Jersey state hospitals based on its finding of the patients' constitutional right to refuse medication. 476 F. Supp., above, at 1313. As part of its order, the court required monthly reports from the hospitals involved. Those reports which cover the period from January 1979 to November, 1981 have now been reviewed and have been summarized for the first time by the Division in its brief amicus curiae for the purpose of aiding the Court in its consideration of this case.

As stated above, the Division asks this Court to permit the late filing of its amicus brief in this case because of the unusual circumstances behind this filing. These circumstances involve a scheduling conflict arising from the overlap of critical dates and deadlines between Rennie and this case. These circumstances resulted in this late filing and support granting of the

Division's motion.[2] But for the schedule of its consideration and efforts in these matters, the Division would have filed as amicus in this case on a timely basis. The Division still wishes to participate in this case in the traditional role of amicus curiae: it desires to inform the

---

[2]The following relevant events occurred in Mills and Rennie during 1981:

January 5, 1981	Rennie Third Circuit in banc order
February 20, 1981	Mills pet. for cert. filed 49 U.S.L.W. 3665 (U.S. March 10 1981)
April 20, 1981	Mills cert. granted 49 U.S.L.W. 3788 (1981) (U.S. March 21, 1981)
May 12, 1981	Rennie Third Circuit in banc argument
May 12, 1981	Rennie pet. for cert. filed
June 8, 1981	Rennie cert. denied 49 U.S.L.W. 3911 (U.S. June 9, 1981)
July 9, 1981	Rennie Third Circuit decision
October 1, 1981	Mills Respondents' Motion to Dismiss Writ of Cert. filed

Court of its present views on the use of these drugs based on its extensive experience with them apart from its role in the Rennie decision. The Division also desires to bring the record of the New Jersey due process system before this Court. This New Jersey data is an indispensable source of information for the

---

October 1, 1981	Mills Brief for Respondents filed
October 7, 1981	Rennie pet. for cert. filed
October 9, 1981	Mills Respondents' Motion to Dismiss Writ of Cert. denied 50 U.S.L.W. 3300 (U.S. October 20, 1981)
November 9, 1981	Rennie Motion for In Tandem Argument with Mills filed
November 30, 1981	Rennie In Tandem Motion denied 50 U.S.L.W. 3446 (U.S. December 1, 1981)
December 8, 1981	Mills listed as case #11 for week of January 11, 1982 on Supreme Court List of Argument January session

otherwise largely hypothetical consideration of the cost efficiency of such systems. The Division, therefore, urges this Court to grant its motion so as not to have the happenstance of the Rennie and Mills schedules foreclose the Court from directly considering the Division's experience and views on the issues in this case.

Respectfully submitted,

STANLEY C. VAN NESS
PUBLIC ADVOCATE
Department of the Public Advocate
520 East State Street
Trenton, New Jersey 08625
(609) 292-1780
Attorney for Amicus Curiae

MICHAEL L. PERLIN
Director
John J. Ensminger
J. Benedict Centifanti
Law Clerk
Division of Mental Health Advocacy
Department of the Public Advocate
428 East State Street
Trenton, New Jersey 08625

Date: December 29, 1981

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-1417

MARK J. MILLS, MICHAEL GILL AND
WILLIAM MALAMUD,

Petitioners,

v.

RUBIE ROGERS, ABLE BOLDEN, BETTY BYBEL,
JAMES COLLERAN, DONNA HUNT,
WILLIE WADSWORTH, AND HAROLD WARNER,

Respondents.

On Writ of Certiorari to the United
States Court of Appeals for the
First Circuit

BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF MENTAL HEALTH ADVOCACY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

This case presents the question of whether the Constitution applies to competent psychiatric patients who wish to refuse the administration of those drugs

which often cause disabling, permanently crippling side-effects. Because of its experience in representing patients in all matters involving their admission to hospitals and conditions while hospitalized, including questions involving drug use, amicus, Department of the Public Advocate, Division of Mental Health Advocacy is uniquely qualified to share its experiences on this subject with the court. Through its representation in Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978), suppl. 476 F. Supp. 1294 (D.N.J. 1979), mod. 653 F. 2d 836 (3 Cir. 1981), cert. petit. filed October 7, 1981 (No. 81-5534), in tandem motion den. 50 U.S.L.W. 3446 (1981), a case strikingly similar to Mills, and subsequent reports filed with the district court, amicus can document what happens when procedural due process attaches to refusal of medication

decisions; this information is not available to this Court from any other source.

Through its general experience in all areas of mental health litigation, amicus has become experienced in representing persons such as respondents in Mills: patients facing the involuntary imposition of medication. Through its staff of attorneys and field representatives, amicus has, on a day-to-day basis, dealt with problems similar to those before the Court here. In addition, through its informal monitoring of compliance with the procedural due process scheme mandated by the district court at the five New Jersey state hospitals, amicus can show this Court that it is both possible and advisable to provide legal safeguards to such patients in a manner that is realistic and

practical.[1] The experiences of amicus and its clients have been opposite the scenario suggested by petitioners and by amicus American Psychiatric Association: representation can be

---

[1]Other due process schemes have been apparently contemplated by both the First Circuit, calling for "exploration and evaluation" of "a variety of procedural devices designed for their suitability to...institutional life," Rogers v. Okin, 634 F. 2d 650, 664 (1 Cir. 1980), cert. granted sub nom. Mills v. Rogers, --U.S.--, 101 S. Ct. 1972 (1981), and a federal district court in Ohio, Davis v. Hubbard, 506 F. Supp. 915, 939 (N.D. Ohio 1980), remanding so that parties could express their views as to the "time, formality and content of the [drug refusal] hearing required under the due process clause;" see also, Davis, above, Order Approving Plan for Independent Psychiatric Review of Disputed Psychiatric/Medication Decisions, No. C73-205 (N.D. Ohio, May 18, 1981) (reported at 15 Clearinghouse Rev. 528 (1981)).

afforded at procedural due process hearings cost-efficiently in a way which promotes the doctor-patient relationship.

Through this brief, the Division hopes to share this information with the Court, the parties and other amici.

Amicus has received the consent of respondents to the filing of this brief. A copy of this consent is being filed with the clerk of this Court at the time of filing of this motion and brief. As already noted in the attached motion, petitioners have declined to give their consent.

STATEMENT OF PROCEEDINGS

Amicus adopts respondents' statement of proceedings heretofore filed with the court.

SUMMARY OF ARGUMENT

This is a case which revolves about the involuntary use of psychotropic medication in a state-run psychiatric institution, the patients' right to refuse such medication, and what process is due when a patient so refuses. Amicus, Department of the Public Advocate, Division of Mental Health Advocacy, a statutory agency created by the New Jersey legislature, is experienced in representing persons similar to respondents in this case: institutional residents facing the forced imposition of intrusive and invasive medications by state hospital doctors (Point IA). Its representation of its clientele has afforded amicus the opportunity to familiarize itself with public hospital drug practices uniquely similar to the fact pattern before the Court: amicus has

represented and continues to represent similar persons at risk in similar institutions, subjected to similar medications with similar side-effects (Point IB).

Amicus' overall experience reveals that it is possible (and advisable) to provide procedural due process protections to involuntarily hospitalized patients facing such medication in a realistic and practical way which both protects their constitutional rights and accounts for both fiscal realities and administrative necessities.

Fears of expensive, wasteful hearings are groundless (Point IIA); amicus' general experience and its specific familiarity with the reports filed with the federal district court in New Jersey show that a due process system works effectively, is cost-efficient,

promotes the doctor-patient relationship, and properly protects patients' rights. The "chamber of horrors" arguments advanced by petitioners and supporting amici have no basis in fact; there is no evidence that New Jersey patients legitimately in need of medication do not receive it because of due process requirements. Hearings may actually result in cost-savings (Point IIB); certainly they are not "time-consuming procedural minuets" as feared in Parham v. J.R., 442 U.S. 584 (1979), nor do they exacerbate in-hospital tensions (Point IIC).

ARGUMENT

I. THE DANGERS OF ANTIPSYCHOTIC DRUGS AS USED IN THE PUBLIC HOSPITAL SETTING AND THE EFFECTS OF DUE PROCESS ON THEIR USE HAVE BEEN AMONG THE PRINCIPAL CONCERNS OF AMICUS, THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE

A. The Division Of Mental Health Advocacy Is Uniquely Qualified In This Area

In the course of its representation of its clients since 1974, the New Jersey Department of the Public Advocate's Division of Mental Health Advocacy[2] has developed a unique perspective on both the general issue of how public mental patients are treated and on the specific

---

[2]The Division of Mental Health Advocacy, a state agency within the New Jersey Department of the Public Advocate, has two primary statutory functions: It "may provide...legal representation... for any indigent mental hospital admittee in any proceeding concerning the admittee's admission to, retention in, or release from confinement in...[a mental hospital or a similar facility]," N.J.S.A. 52:27E-24,

matter of how drugs are administered to such patients. In this context, it deals with a wide range of public concerns[3] in

---

and it "may represent the interests of indigent mental hospital admittees in such disputes and litigation, as will... best advance [their] interests as a class on an issue of general application to them," N.J.S.A. 52:27E-25.

[3]The Division is one branch of the Department of the Public Advocate, an agency described by Mr. Justice Marshall as reflecting an "enlightened view of the duty of government [by] provid[ing] for the representation of traditionally unheard interests," Heffner, "Legislative Oversight: An Analysis of L.1974, Chapter 27, Department of the Public Advocate Act," 1 Seton Hall Legis. J. 76, 90-91 (1976) (remarks at the dedication of Seton Hall Law Center, Newark, New Jersey, May 3, 1976); see generally, Mt. Laurel Tp. v. Public Advocate of N.J., 83 N.J. 522, 530-535, 416 A. 2d 886 (1980), upholding the constitutionality of the Public Advocate Act (N.J.S.A. 52:27E-1 et seq.), and, 83 N.J., above, at 536, characterizing the Department as "nourishing and revitalizing our political system" and "admirably further[ing] the principles embodied in our Constitution." See also, Rennie, 462 F. Supp., above, at 1147 ("It is clear in this case that without the tireless efforts of Mr. Gelman [trial

hospitals throughout the State of New Jersey,[4] including questions of adequacy of medical treatment,[5] Doe, above; acceptability of

---

counsel] and his staff at the Public Advocate's Office, Mr. Rennie could not effectively have made an argument before a fact-finder and brought his case before this court").

[4]In executing its statutory mandate, the Division has established three regional field offices to provide individual representation to persons facing hospitalization and at periodic review hearings, see generally N.J. Ct. R. 4:74-7, as well as a state-wide class action office to provide class representation. The field offices provide representation to residents of ten of New Jersey's 21 counties, comprising about 33% of the State's population. In 1980, the Division represented 50% of all involuntary commitment proceedings scheduled in the State.

[5]In addition to providing individual representation on behalf of thousands of patients in New Jersey's state and county hospitals in its nearly eight years of existence, the Division has litigated on behalf of indigent mental hospital patients in a wide variety of areas including right to treatment, procedural due process rights, institutional civil rights and, most relevant

hospital procedures, Goodwin, above;

efficacy of treatment regimens,

---

to this case, medication issues. See, e.g., Doe v. Klein, 1 Ment. Dis. L. Rptr. 475 (N.J. Super. Ct., Law Div. 1977) (right to treatment); Schindenwolf v. Klein, 5 Ment. Dis. L. Rptr. 60 (N.J. Super. Ct., Law Div. 1980) (right to participate in therapeutic, compensated, voluntary work program); Falter v. Veterans Administration, 502 F. Supp. 1178 (D.N.J. 1980) (civil rights of patients in V.A. facility); Goodwin v. Shapiro, Docket #80-2828 (D.N.J. 1981) (right to treatment); In re W.S., 152 N.J. Super. 298, 377 A. 2d 969 (Cty. Ct. 1977) (procedural due process required prior to electroshock imposition); In re C.B., Docket #AM 774-75 (N.J. App. Div. 1976) (procedural due process required prior to use of electroprod as part of "aversive therapy" program); In re Kolodka, Docket #ESCC 395-75 (N.J. Cty. Ct. 1975) (right to refuse treatment); In re G.G., Docket #MECC 164-75 (N.J. Cty. Ct. 1975) (right to receive specific treatment). C.B., Kolodka and G.G. are discussed in Van Ness and Perlin, "Mental Health Advocacy--The New Jersey Experience," in Kopolow and Bloom, eds., Mental Health Advocacy: An Emerging Force in Consumers' Rights 62 (1978), and "The Right to Refuse Treatment in New Jersey," 6 Psych. Annals 300 (1976).

Schindenwolf, above, and patient autonomy, Falter, above.[6] See Affidavit of Arthur Rosenberg, Esq., Appendix A; it is thus especially appropriate that it shares its views with the Court, the parties and amici in this matter.[7]

B. Amicus Can Document The Inherent Dangers Of The Types Of Drugs Involved In Mills As Used In Public Hospital Settings Under Conditions Of Confinement Strikingly Similar To Respondents'

Through its regular representation of its clients, amicus has become especially familar with the dangers inherent

---

[6] Amicus became involved in treatment questions soon after its creation. See, e.g., C.B., Kolodka, G.G., all above.

[7] Amicus is also intimately familiar with monitoring, Doe, above; Goodwin, above, compliance enforcement, Schinden-Wolf, above; statistical proofs, Falter, above, and financial issues, Falter and Goodwin, both above.

in the use of the drugs in question in public hospital settings. This familiarity is relevant to this case for two reasons: the conditions of confinement of amicus' clients are virtually identical to those of plaintiffs in Mills, and amicus' experiences in representing clients facing forced drugging are also on point.

The similarity between amicus' caseload and the Mills case extends beyond a near identity in legal principles; it extends specifically to the conditions under which both New Jersey patients and Massachusetts patients are confined: similar persons at risk are confined in similar institutions, subjected to similar kinds of medications with similar side-effects. These factual parallels make amicus' experience even more compelling for the court to consider

in Mills.

1. Similar persons are at risk

The plaintiff-patient population represented by amicus is strikingly like the patient group in Mills.[8] For purposes of legal analysis, both groupings are like the characterization of the institutionalized mentally retarded in Romeo v. Youngberg, 644 F. 2d 147, 163, n.35 (3 Cir. 1980), cert. granted --U.S.--, 101 S. Ct. 2313 (1981): "a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude" (also applicable to the mentally ill, see id. at 168, n.53; see also, Scott v. Plante, 641 F. 2d 117, 125 (3 Cir. 1981), cert. petit. filed --U.S.--, 49 U.S.L.W. 3887

[8]See cases cited at n.3, above.

(1981)); see also United States v. Carolene Products Co., 304 U.S. 144, 152-153, n.4 (1938) ("more searching judicial inquiry" may be appropriate in the face of "prejudice against discrete and insular minorities"). Amicus' clients and respondents in Mills are the sort of persons "saddled with...disabilities [and] subjected to...a history of purposeful unequal treatment, [and] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973); similar patients are similarly at risk.

2. Similar types of institutions

The Austen Unit of the Boston State Hospital is a "drab, gloomy, poorly lighted structure in a state of chronic despair," Rogers, 478 F. Supp., above, at 1356; New Jersey hospitals have "large, bleak and unpleasant wards" where patients have "little structured activity," Rennie, 476 F. Supp., above, at 1299. Facilities in both states are classically "total institutions";[9] Their

---

[9] See, e.g., Goffman, Asylums (1961); see generally, Cospito v. Califano, 89 F.R.D. 374, 380-381 (D.N.J. 1981) (contrasting state hospital institutionalization with nursing home residence); see also, Pennhurst State School v. Halderman, 451 U.S. 1, 101 S. Ct. 1531, 1534 (1981) (characterizing the District Court's fact-findings of "dangerous" and "inadequate conditions" -- causing "deteriorat[ion] of physical, intellectual and emotional skills" of some residents -- at the facility in question to be "undisputed").

similarities for purposes of this case are striking.[10]

3. Similar medications used

Amicus' experience and the Mills record reveal a striking similarity in the type of medications administered to

---

[10]This Court has repeatedly recognized that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution." Procunier v. Martinez, 416 U.S. 396, 405 (1974); see also, Hutto v. Finney, 437 U.S. 678, 681 (1978) (adopting a District Court characterization of conditions in an Arkansas prison as "a dark and evil world completely alien to the free world); Vitek v. Jones, 445 U.S. 480 (1980) (application of due process to prison-hospital transfers). It cannot now be suggested that patients such as those represented by amicus and in Mills -- who have committed no crimes, and who have been hospitalized to be helped, not to be punished, Addington v. Texas, 441 U.S. 418, 428 (1979) -- have fewer rights than do convicts. As the Third Circuit noted in Rennie, 653 F. 2d, above, at 846: "The Constitution is at least as viable behind the walls of a psychiatric hospital as in a prison."

patients in New Jersey and Massachusetts, see, e.g., Rogers, 478 F. Supp., above, at 1359-1360; Brooks, "The Constitutional Right to Refuse Antipsychotic Medications," 8 Bull. Am. Acad. Psych. & L. 179 (1980), and in the way drugs are misadministered in such institutions, see, e.g., Brooks, above; Mills, Joint Appendix, at 106-107 (Plaintiffs' Proposed Findings of Fact). This similarity in medication use, evident also in other hospital drug litigation,[11] reflects the reality that the antipsychotic drugs regularly in use in

---

[11] See, e.g., Davis, 506 F. Supp., above, at 925-939; In re Boyd, 403 A. 2d 744 (D.C. Ct. App. 1979); In re K.K.B., 609 P. 2d 747 (Okla. Sup. Ct. 1980), Goedecke v. State Dep't of Inst'ns, 603 P. 2d 123 (Colo. Sup. Ct. 1979); see also In re Guardianship of Roe, 421 N.E. 2d 40 (Mass. Sup. Jud. Ct. 1981).

such circumstances are dangerous instrumentalities which must be subject to intensive judicial regulation. This is especially true when such drugs are administered involuntarily to patients involuntarily hospitalized in state-run facilities by state employees through the sanction of a state legislative scheme; see, e.g., Scott v. Plante, 532 F. 2d 939, 946 (3 Cir. 1976).

First, recent psychiatric and drug research increasingly confirms both the potential and real dangers of most of the drugs in question, see, e.g., Mills, Joint Appendix, at 80-107 (Plaintiffs' Proposed Findings of Fact), especially when administered in the indiscriminate and careless manner which characterizes the operation of both the New Jersey and Massachusetts pattern of state hospital drug use. Because of the uniquely inopportune combination of the dangerousness

in se of the medications and the history of their inevitable misadministration, such drugs should be treated, for purposes of regulation, in the same way as other inherently dangerous instrumentalities[12] such as nuclear power,[13] med-

---

[12]See, e.g., Restatement (Second) of Torts §402A (Special Liability of Seller of Product for Physical Harm to User or Consumer). See also, id., Tentative Draft No. 7 (1977), Comment d., at 3 (defining "intimate bodily use"), and Comment k. at 5-6 (noting, in discussing "unavoidably unsafe products," that a drug, e.g., will not be "unreasonably dangerous" [emphasis in original] when "properly prepared and accompanied by proper directions and warnings"); Herbstmann v. Eastman Kodak Co., 68 N.J. 1, 10-11, 342 A. 2d 181 (1975); Huddell v. Levin, 537 F. 2d 726, 733-734 (3 Cir. 1976) (both applying §402A).

[13]See, e.g., 42 U.S.C.A. §2241 (establishment of atomic safety and licensing boards of Nuclear Regulatory Commission); 42 U.S.C.A. §2153e (protection of environment in peaceful nuclear activities); 42 U.S.C.A. §2156 (criteria governing nuclear exports).

ical diagnostic x-ray use,[14] or nuclear medicine technology.[15]

In addition, other treatments which had been formally hailed as panaceas for mental illness have now, because of evidence of harm and/or unreliability, either been virtually discarded (e.g., insulin shock therapy[16] or malaria therapy[17]) or have become subject to in-

---

[14]See, e.g., N.J.A.C. 7:28-15.1 et seq.

[15]See, e.g., N.J.A.C. 7:28-24.1 et seq.

[16]Mora, "Recent Psychiatric Developments (Since 1939)," in 1 Arieta, ed., American Handbook of Psychiatry 43, 65-66 (2d ed. 1974) (hereinafter Arieta). Insulin shock has been characterized by a leading forensic psychiatrist as a "barbaric and cruel" treatment. Sadoff, "Basic Facts About Mental Illness," in 1 Friedman, ed., Legal Rights of Mentally Disabled Persons 163, 174 (1979).

[17]Ellenberger, "Psychiatry From Ancient to Modern Times," in Arieta, above, at 3, 26.

tensive judicial and/or legislative scrutiny,[18] (e.g., electroshock therapy,[19] lobotomy,[20] experimentation,[21] or sterilization).[22] The psychiatric

---

[18]See generally, 4 App., Task Panel Reports Submitted to the President's Commission on Mental Health 1358, 1431-1436, 1466 (1978).

[19]See, e.g., N.J.S.A. 30:4-24.2d(2); In re W.S., above.

[20]See, e.g., N.J.S.A. 30:4-24.2d(2); Kaimowitz v. Michigan Dep't of Mental Health, Civ. No. 73-19434 (Mich., Wayne Cty. Cir. Ct. 1973).

[21]See, e.g., 42 U.S.C.A. §9501(1)(E).

[22]See, e.g., N.J.S.A. 30:4-24.2d(2); In re Grady, 85 N.J. 235, 426 A. 2d 467 (1981). The Grady court put the matter in its proper perspective:

> Sterilization has a sordid past in this country--especially from the viewpoint of the mentally retarded. In the early part of this century many states enacted compulsory sterilization laws as an easy answer to the problems and costs of caring for the misfortunate of society. Lawmakers may have sincerely believed that the social welfare would improve if fewer handicapped people were

establishment generally concurs in these decisions, see Brooks, 8 Bull. Am. Acad. Psych. & L., above, at 182. The best available recent evidence suggests that drugs such as the ones under scrutiny have similar dangerous and/or irreversible effects. See, e.g., Rogers, 478 F. Supp., above, at 1359-1360. Importantly, because the development of antipsychotic drugs is so comparatively

---

born, but they were too quick to accept unproven scientific theories of eugenics...,

Half a century later, we have serious doubts about the scientific validity of eugenic sterilization, see North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 454 (M.D.N.C. 1976); Note, Eugenic Sterilization -- A Scientific Analysis, 46 Den. L. J. 631 (1969); Ferster, Eliminating the Unfit--Is Sterilization the Answer? 27 Ohio St. L. J. 591, 602-04 (1966), as well as its morality.

85 N.J., above, at 245-247 (footnotes omitted).

recent,[23] there have been few studies dealing with the ultimate "generational" impact (that is, the effect on future, unborn generations) of such drugs.[24] This unknown, additional potential future harm also serves as a warning of the unknown extent of the dangers which is faced by all those subject to the involuntary imposition of such drugs. Residents of New Jersey and Massachusetts face similar risks in this regard.

---

[23]Psychopharmacology is less than thirty years old, see, e.g., Mora, above, at 66; this time period can be compared to some 50 years' experience with sterilization, Grady, above, 45 years with psychosurgery, Mora, above, and about 40 years with insulin shock, Mora, above, at 65.

[24]See, e.g., Prigg, "Abnormalities in Newborn Babies," 224 Practitioner 309, 311 (1980) (possibility psychotropic drugs may cause congenital abnormalities in babies born up to five years after ingestion).

d. Similar side-effects

Rampant and disabling side-effects are found in a majority of patients at state hospitals. See, e.g., Mills, Joint Appendix, at 80-106 (Plaintiffs' Proposed Fact-Findings). The side-effects, many of which are permanently crippling, disfiguring and disabling, are starkly portrayed in the court records.[25]

The harm of side-effects from forced drugging is not like other violations complained of in the context of hospitalization. Their irreversibility, the resultant permanent im- of functioning, and the likelihood of

---

[25]See Ross, et al., "'On-Off' Syndrome Treated with Lithium Carbonate: A Case Report," 138 Am. J. Psych. 1626, 1627 (1981), terming one of the side-effects, akinesia, as "a disaster for most patients."

future social exclusion[26] (thus, inevitably requiring future rehospitalization) all add up to a compelling reason to scrutinize claims of drug harm most carefully. The Third Circuit's conclusion in Rennie that "the risk of serious side-effects stemming from the administration of antipsychotic drugs is a critical factor in our determination that a liberty interest is infringed by forced medication,"[27] is one which is amply borne out by the record in Mills and elsewhere. In their totality, therefore, the similarity of side-effects suffered by patients in Mills and in amicus' experience is striking in all instances.

---

[26] "Drugs inhibit a patient's ability to learn social skills needed to fully recover from psychosis," Rennie, 476 F. Supp., above, at 1299.

[27] 653 F. 2d, above, at 843, n.8.

II. NEW JERSEY'S MEDICATION-REVIEW PROCEDURES PROTECT PATIENTS' CONSTITUTIONAL RIGHTS WHILE TAKING INTO CONSIDERATION FISCAL REALITIES AND ADMINISTRATIVE NECESSITIES

A. New Jersey Has Had Almost Two Years Experience With An Effective And Well-Administered Medication-Review System

New Jersey has, for almost two years, provided a system for handling instances of medication refusal at five State hospitals, pursuant to a district court order in Rennie, 476 F. Supp., above, at 1313. The system is based in part on procedures that were, at that time, in the process of being implemented by the State's Division of Mental Health and Hospitals. Id., at 1309. The procedures implemented in New Jersey have protected patients' rights in a realistic, cost-efficient way which does not impede effective administration of the state hospitals.

The system provides for a number of steps to determine whether a patient (1) will knowingly consent to the application of medication, (2) is competent to give such consent, (3) may be justified in refusing his consent, or (4) should be medicated in spite of his refusal. Before medication is administered, patients are asked to sign a consent form which describes the right to refuse treatment, advises the patient of the availability of a patient advocate, and states all known short-term and long-term side-effects of the drug to be consented to. Id. at 1313.

Legally or "functionally" incompetent patients may be medicated without their consent, provided that such decisions are referred to the patient advocate who may, at his discretion, initiate a review. A "functionally" in-

competent patient is one who is "unable to provide knowledgeable consent to treatment, although he has not been declared incompetent by a court of law." Id., at 1314.[28]

In spite of a refusal, a patient may be involuntarily medicated prior to a hearing in an emergency situation, defined by the district court as "a sudden, significant change in the patient's condition which creates danger to the patient himself or to others in the hospital." Id., at 1313. The medication may in such an instance be forcibly ad-

---

[28]One commentator has suggested that the functional incompetence determination may be "a loophole, permitting unconsented-to medication and bypassing some needed independent psychiatrist hearings." Brooks, 8 Bull. Am. Acad. Psych. & L., above, at 196. See page 40 below for a description of the role of the independent psychiatrist in this system and page 39 as to that of the patient advocate.

ministered for 72 hours on certification of the treating psychiatrist and extended for an additional 72 hours on certification of the medical director "if the threat to life or limb continues." Id., at 1314.[29]

Patients refusing medication are contacted by a patient advocate who acts as an informal "counsel" and insures that the appropriate procedures are conducted. Patient advocates are appointed by the Office of the Commissioner of the Department of Human Services and may be lawyers, psychologists, social workers, registered nurses, paralegals, or qualified laymen. Id., at 1311 and 1313.

---

[29]As will be discussed below, the number of second emergency certificates has been considerably less than the number of first emergency certificates.

Decisions as to the appropriateness of involuntary medication are made at an informal hearing conducted by an independent psychiatrist, at which the patient is usually represented by the patient advocate. The independent psychiatrist may review all hospital records, conduct a medical examination of the patient, and request the appearance of hospital employees.[30]

B. The New Jersey Experience Belies Predictions Of Administrative And Medical Difficulties Resulting From Medication-Review Hearings

Critics of patient-instigated medication-review hearings have pre-

---

[30] It has been the position of amicus, the Department of the Public Advocate, that such hearings do not fully comport with due process because of the absence of a mandate for independent counsel and non-psychiatric decision-makers. See also, as to independent counsel, Brewster v. Dukakis, 520 F. Supp. 882, 887, 891 (D. Mass. 1981).

dicated negative effects at a number of levels, from excessive costs (ultimately paid for by the taxpayers) to administrative difficulties resulting in a reduced quality of treatment. Brief of Petitioners, at 75. However, virtually none of these arguments have been subjected to any impartial empirical analysis.

When the issue of the cost of the system was before the District Court, the New Jersey Department of Human Services estimated that an independent review system might cost as much as $3 million per year. Rennie, 476 F. Supp., above, at 1306, and id., 653 F. 2d, above, at 865, 869 (Gibbons, J., dissenting). This estimate, however, has proven to be wildly inaccurate. Actual figures provided in reports submitted to the District Court suggest, on the contrary, that the

total expense for almost two years of conducting such hearings may be less than $10,000, or about .03% of the state's estimate.

In that period from January 1980 to October 1981, the last report available at the time of preparing this brief, there have only been 105 such hearings at all five state hospitals. See Affidavit of Patrick Reilly, Appendix B.

The independent psychiatrists required by the District Court have been paid $75 per hour for their participation. The majority of hearings have taken less than one hour to conduct. See Affidavit of Arthur Rosenberg, Esq., Appendix A.

It is questionable whether it would be appropriate to attribute the salaries of the patient advocates to the expenses

of the medication-review system, because these individuals have numerous responsibilities outside the ambit of that system. See Affidavit of Patrick Reilly, paragraph 11, Appendix B. Additionally, some of them were hired prior to the Rennie order. 476 F. Supp., above, at 1311. A commentator has noted that the cost of New Jersey's medication-review hearings has been "nominal." Brooks, 8 Bull. Am. Acad. Psych. & L., above, at 201.[31]

---

[31]Recently, a federal court has mandated a comprehensive advocacy system for a designated region in western Massachusetts. The estimated cost of the program amounts to "well less than one-half of one per cent of the annual operating budget of Region One in the Department of Mental Health." Brewster, 520 F. Supp., above, at 892. The Monitoring Report appended to that opinion noted further that "a well-established advocacy system reduces or eliminates the need for constant recourse to the federal court and avoids the possibility of this lawsuit becoming an open book in perpetuity." Id. at 896.

Furthermore, statistics gathered from the reports provided to the District Court in New Jersey establish that there has been a steady decline in the number of hearings requested and conducted in the nearly two years of operation of the system. See Affidavit of Craig Rodine, Appendix C. This suggests that the costs of the system may become even more negligible.

Another criticism that has, on occasion, been leveled against the idea of medication-review procedures involves the supposed loss of administrative and therapeutic time. Cf. American Psychiatric Association [hereinafter APA] Amicus brief, at 21-22, Brief of petitioners at 75. The fact that only 105 hearings have been conducted in over almost two years at five state hospitals easily rebuts this assertion. By the

terms of the district court's order, the independent psychiatrist has no compulsory access to witnesses though he may request the appearance of hospital employees. Rennie, 476 F. Supp., above, at 1314. The independent psychiatrist may make his decision solely on his own examination and an evaluation of the hospital records of the patient. Such a system is designed to minimize any interference with hospital operation

Additionally, the argument that medication-review procedures result in loss of therapeutic time implies that there is therapeutic time to be lost. Unfortunately, in most state hospital systems this is all too infrequently the case. Rennie, 476 F. Supp., above, at 1299: ("One expert testified that drugs are the 'be-all and end-all' at the hospitals.")

New Jersey's medication-review procedures are essentially based on the sort of peer review systems that were initially devised within the medical community itself. Brooks, 8 Bull. Am. Acad. Psych. & L., above, at 199. Such systems were conceived as a means of deterring outside regulation, essentially as a form of self-policing.[32] The widespread use of peer review systems would suggest that the medical community itself has found little to fault in the idea. Negative

---

[32]Sullivan, "Peer Review and PSRO in American Psychiatry," 49 Psych. Q. 331 (1971); Hare-Mustin et al., "Rights of Clients, Responsibilities of Therapists," 34 Am. Psychol. 3 (1979) ("It is unfortunate that statements of ethical standards represent more of a 'salute to the flag' for therapists than a bill of rights for clients").

reaction seems to come, instead, from the idea that such systems might be judicially mandated. Brooks, 8 Bull. Am. Acad. Psych. & L., above, at 192, and authorities cited at id.

Because legal regulation was heretofore regarded as interference with medical prerogative, it may be that the first steps towards a coexistence of law and medicine in this area were antagonistic. However, there are indications that, with time, such difficulties may be overcome. One report, provided to the district court in Rennie, states under the heading of "staff morale":

> Since we have lived with the Rennie v. Klein decision for over a year now, staff have adjusted and no serious morale problems attributable to the decision exist at this time.

Greystone Park Psychiatric Hospital

Monthly Report to the District Court, January 1981. Furthermore, the Division of Mental Health and Hospitals has had no difficulty finding non-affiliated psychiatrists willing to participate in the medication-review procedures, suggesting that reaction to the program has not been adverse in the outside medical community. See Affidavit of Patrick Reilly, Appendix B. There is also no reason to believe that the hospital system will have any additional difficulty recruiting for psychiatric positions because of the medication-review system. Brooks, 8 Bull. Am. Acad. Psych. & L., above, at 211-212. In fact, the possibility should be considered that an effective peer review system might actually work to enhance the prestige of working in public psychiatric settings.

It has been argued that providing patients with procedural recourse to medication decisions will harm their therapeutic relationships with their doctors. The basic supposition of this argument, as with the prior argument concerning therapeutic time, is that there are therapeutic relationships capable of being harmed. However, even if such a relationship were postulated, there is reason to question that a medication hearing would damage it. In fact, should the treating physician's recommendations be accepted, it is suggested that the patient's trust in him will be increased.

It must be remembered that for that significant percentage of patients who are involuntarily committed, their basic relationship with the hospital is pervaded with a legal aura from the very beginning. The medical staff is hardly

isolated from the attendant legal proceedings and the treating physician quite frequently testifies for commitment of his patients. See, e.g., N.J. Ct. R. 4:74-7, and Pressler, Current N.J. Court Rules, Comment to R. 4:74-7 (1982), at 862-868. Though in the past it was often assumed, without proof, that commitment hearings could be deleterious to a patient's mental health, this assumption has recently been called into serious question.[33] Unfortunately, no one appears yet to have undertaken the sort of long-range

---

[33] See Ensminger and Liguori, "The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential," 6 J. Psych. & L. 5 (1978); Cumming and Goyer, "Therapeutic Consequences of the Involuntary Commitment Process," 1 Am. J. Forens. Psych. 37 (1979).

psychosocial study which might provide some scientific answers in this debate.

A subtle but important corollary of the argument that medication-review hearings will damage the physician-patient relationship is an assumption that such relationships exist in medical isolation, free from governmental interference. This, of course, is not so; it can hardly be seriously argued that administrative actions and restrictions -- in terms of staffing, salaries and provision of other appropriate or even necessary therapies -- are made from purely medical considerations. Amicus is not arguing that the medical profession lacks an adequate ethical code for its practitioners, but, rather, that the implementation of that code in state hospitals has been inadequate for non-medical reasons. The district court in New Jersey has

attempted to solve this difficulty with the same kind of peer review system that the medical profession has in many other contexts devised for itself. Brooks, 8 Bull. Am. Acad. Psych. & L., above, at 192.[34]

---

[34]The administrative pressures inside of a state hospital system explain in part, why the district court in New Jersey felt it appropriate that involuntary medication decisions be made by psychiatrists outside that system, Rennie, 476 F. Supp., above, at 1310, noting:

> Here there are institutional pressures on treating physicians to medicate patients unnecessarily. Treatment team review is somewhat controlled by the treating physician and cannot constitute an independent determination. While the medical directors have asserted in their testimony that they are capable and willing to overrule their staff doctors when necessary, the court finds more credible the testimony of those experts who stated that the directors would inevitably be caught in a conflict between patients' interests and pressures from their staff.

See also Zlotnick, "First Do No Harm: Least Restrictive Alternative Analysis and the Right of Mental Patients to Re-

Finally, arguments have been made to the effect that medication-review procedures will harm patients. Ways in which this has been suggested as happening include:

(1) inability of medication-review systems to deal with emergencies;

(2) delays in providing medications where no emergency procedure can be employed;

(3) disruption of ward life and hospital routine resulting in less medical attention; and

(4) inappropriate resort to alternative treatment mod-

---

fuse Treatment," 83 W. Va. L. Rev. 375, 433 (1981):

> Moreover, it is critical to realize that the risk of error is heavily skewed towards providing inappropriate or excessive treatment, rather than towards withholding appropriate treatment.

alities or to no therapy whatsoever.

See, Brooks, 8 Bull. Am. Acad. Psych. & L., above, at 203-212.

The emergency procedure outlined at Point II.A. above adequately takes into account the first suggested problem. The second will only occur in non-emergency situations where the delay, at least in the New Jersey system, will be minimal. This minimal delay is negligible when balanced against the intrusiveness and risks of harm of forced drugging.

The suggestion that ward life and hospital routine are disrupted by medication-review procedures is also not borne out by any evidence. In fact, as previously noted, it appears that over the course of almost two years of such hearings in New Jersey, there has been a steady decline in the frequency with which patients have availed themselves

of the procedure.[35] A statistical analysis indicates that this decline has statistical significance. See Affidavit of Craig Rodine, paragraph 3, Appendix C, and attached graph showing curve-fitting analysis. This would seem to argue that not only does the medical staff, as noted above, adjust to such hearings, but also that the patients will be less likely to resort to them once they are part of the procedural protections available to patients.[36]

---

[35]The report to the district court for the month of November was received as this brief was being completed and indicates that no medication-review hearings were held in November, 1981.

[36]It is interesting to note that the district court predicted the possibility of the number of hearings declining, saying:

> The court also believes that if an independent check on forced medication is established, doctors would learn the legal limits of involuntary medication and the

In any case, it certainly "is important for all professionals working in the mental health area first to listen to the patient and second, to the extent possible, allow the patient to participate in the decision-making in his own treatment." Sadoff, Legal Issues in the Care and Treatment of Psychiatric Patients: A Guide for the Mental Health Practitioner 108 (1982) (in print, pagination by manuscript draft).

On the basis of the New Jersey experience, it can be concluded that rea-

---

> number of attempts to force psychotropics would eventually decrease. This would also mean that the number of cases reaching an independent decision maker would eventually drop to a relatively small number of disputes.

Rennie, 476 F. Supp., above, at 1306.

sonable and practical due process procedures are not burdensome, nor do they impair the doctor-patient relationship in the atmosphere of the institution.

C. Drug Inquiry Hearings Are Not The "Time-Consuming Procedural Minuets" Feared By The Parham Court

Amicus has provided legal representation at due process hearings to thousands of New Jersey patients over the past seven-and-a-half years;[37] dispositions of its cases reveal a wide ranging pattern of individual determinations on individual bases. Dispositions have not been limited to a finite commit/release paradigm; rather the presence of counsel has led to significant judicial creativity in an area not known for such de-

---

[37]See generally, Point I.A.

velopments.[38]

In the same vein, procedural due process safeguards attached in Rennie, above, in such a way as to both realistically protect patients' constitutional rights and take into account fiscal realities and institutional administrative necessities. Contrary to the gloomy picture painted by petitioners and amicus APA, drug inquiry hearings are cost-efficient and help promote rather than "exacerbate" the doctor-patient relationship.

Amicus APA argues that a finding of a right to refuse antipsychotic medication would force the state to "conduct innumerable inquiries into competency before any significant treatment

---

[38]See, e.g., Van Ness and Perlin, above.

is administered," APA Amicus brief, at 23,[39] "for virtually every decision about every medication (and other treatments), and additional hearings as each patient's condition changes," id. Even if the doctrine is not extended this far, "it is clear," APA alleges, "that a procession of hearings on competency will divert personnel and funds from other state priorities." Id. at 24. According to the APA, such hearings would be no more than "'time-consuming procedural minuets,'" id., quoting Parham, 442 U.S., above, at 605.[40]

---

[39]This argument, of course, presupposes that only medication can be characterized as "significant treatment." Nothing in the record supports this assertion.

[40]The brief cites Parham further for the propositions that an increase in hearings would further divert mental health professionals from essential treatment duties (and concommitantly

Similarly, petitioners rely on Parham for the propositions that "judicial proceedings which will create an adversarial relationship between the caretaker and the patient" should be avoided, Brief of Petitioners, at 4, n.26, citing Parham, 442 U.S., above, at 605, 610; that hearings are burdensome "in terms of manpower displacement," id. at 75-76, citing Parham, 442 U.S., above, at 605, and that "'the mode and procedure of medical diagnostic procedures is not the business of judges,'" id. at 77, quoting Parham, 442 U.S., above, at 609.

This reliance on Parham is, however, badly misplaced. The Parham Court was

---

divert funds "'the legislature intended for mental health care,'" id., quoting Parham, 442 U.S., above, at 606), and that such professionals "'in courtrooms and hearings are of little help to patients,'" id., quoting Parham, above.

concerned with specific counterveiling issues: the relationship between parents and children, the special mental health needs of children, and the major diversion of time away from clinical care. These issues are not present in this case; further, Mills has an added factor not in Parham: the extent of the potential danger of permanent deprivation (through drug-induced side-effects). This danger is an even more compelling reason for hearings, especially given the imprecision of psychiatric diagnosis and assessment in this area.[41] Finally,

---

[41] There can be little responsible debate regarding "the uncertainty of diagnosis in this field and the tentativeness of professional judgment."

O'Connor v. Donaldson, 422 U.S. 563, 578, 584 (1975) (Burger, C.J. concurring), quoting, in part, Greenwood v. United States, 350 U.S. 366, 375 (1956).

nothing in amicus' extensive experience in this and related areas supports either the APA's or petitioners' assertions as to either number and/or length of inquiries, costs, or creation of a purported adversarial relationship between doctor and patient.

First, the issues before the Court here are critically different from those in Parham. That case stressed the traditional uniqueness of the parent-child relationship -- "our jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children," id., at 602 -- noting "those pages of human experience that teach that parents generally do act in the child's best interests," id. at 602-603. "Most children, even in adolescence," the Court reasoned, "simply are not able to

make sound judgments concerning many decisions, including their need for medical care or treatment," id. at 603, underscoring that the record revealed not "even a single instance of bad faith by any parent of any member of [the children's] class," id.

The circumstances in this matter are sharply different: the jurisprudential assumptions to be made about the adult patient/hospital keeper relationship differ drastically from those dealing with parents and children. See, e.g., "Developments in the Law -- Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190, 1193-1201 (1974). Further, the record of rampant "serious side-effects" in forcibly-drugged patients, Rennie, 653 F. 2d, above, 843, n.8, flatly contradicts the "best interests" analysis applicable to children. Also, it cannot

be said that amicus' clients "are not able to make sound judgments concerning many decisions." On the contrary, it is presumed that both voluntary and involuntary hospital patients are competent to exercise decision-making judgments.[42] Finally, the total absence of bad faith in Parham cannot be duplicated in drug cases; see, e.g., Rennie, 476 F. Supp., above, at 1309, finding that actions of defendants reflected "their conscious and deliberate indifference to breaches of patients' rights."

Further, Parham suggested that the state's "parens patriae interest in

---

[42] N.J.S.A. 30:4-24.2c; see, e.g., McAuliffe v. Carlson, 377 F. Supp. 896, 905 (D. Conn. 1974), suppl. order rev'd on other grounds 520 F. 2d 1305 (2 Cir. 1975), cert. den. 427 U.S. 911 (1976); Appelbaum and Roth, "Clinical Issues in the Assessment of Competency," 138 Am. J. Psych. 1462 (1981).

helping parents care for the mental health of their children" will be impeded if "parents are unwilling to take advantage of the opportunities because the admission process is too onerous, too embarrassing or too contentious," Parham, 442 U.S., above, at 605. This concern has no analogue in the instant matter; respondents have already been committed, and concerns as to onerousness or embarrassment are simply misplaced. Similarly, the concern that a "formalized, fact-finding hearing" would "[pose a] danger...for significant intrusion into the parent-child relationship," id. at 610, is similarly inapplicable to this case. As indicated above, hearings of the sort contemplated here "contain considerable potential for therapeutic effects," Ensminger and Liguori, 6 J. Psych. & L.,

above, and citations therein; at the least, concerns as to familial intrusiveness are inapposite. See Brooks, 8 Bull. Am. Acad. Psych. & L., above, at 208-210, reviewing recent research literature, showing that mutual participation in treatment decision-making aids "the development of an effective therapeutic alliance."

There is no significant evidence that due process in drug refusal hearings substantially diverts staff; the one lengthy analysis of Rennie's impact indicates that "treatment itself has improved," and that there have been no "substantial additional burdens...placed on treatment personnel." Id. at 213. Neither the threat of manpower displacement conjured up by petitioners nor the personnel diversion gloomily foreseen by APA have,

in fact, materialized.[43] Similarly, APA's prediction of "innumerable inquiries" does not comport with reality, see Point II. B. above. Hearings have been neither repetitive nor numerous; they have been invoked in appropriate circumstances in a "flexible" way which has caused neither "turbulence" nor disruption, id., at 205, 206. See also, Point II.B., above.

Beyond these issues remain the ineluctable truths of the present danger of permanent disability from drug side-effects, see, e.g., Rennie, 653 F. 2d,

---

[43]Brooks points out, id. at 203, that peer review "insure[s] that there is proper supervision of psychiatric practice in a setting in which it has been amply demonstrated that such review is urgently needed."

above, at 843-844, and the imprecision in psychiatric diagnosis and assessment, see, e.g., Addington, 441 U.S., above, at 429 (discussing "lack of certainty and fallibility of psychiatric diagnosis");[44] this fact-pattern is a far

---

[44]This is among the critical reasons why petitioners' reliance on Mathews v. Eldridge, 424 U.S. 319, 344 (1976), see Petitioners' brief at 76, is misplaced. In explaining the "risk of erroneous determination" prong of its three-prong due process test, Mathews relied on Richardson v. Perales, 402 U.S. 389 (1971), for the proposition that the decision-making in question (discontinuation of Social Security benefits) involved "'routine, standard and unbiased medical reports by physician specialists,'" in a context where "'the specter of questionable credibility and veracity is not present,'" Mathews, above, quoting Richardson, 402 U.S., above, at 407.

In drug cases, the "risk of erroneous determination" is high; for the patients, the stakes are enormous. See Point I.B., above. An adverse decision here does not merely mean a denial of governmental benefits as in Mathews or Richardson, but, rather, a potentially major alteration of patients' lives. Again, this is especially so because of the difficulty of making "valid and meaningful"

cry from that before the Parham court.

In short, there is no evidence that due process hearings drain resources, divert staff or delay the administration of needed treatment; all credible and applicable evidence, in fact, paints a contrary picture. Due process hearings

---

psychiatric predictions, see, e.g., State v. Krol, 68 N.J. 236, 254, 344 A. 2d 289 (Sup. Ct. 1975); as this Court has recognized, "it is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirements of adversary hearings," Vitek, 445 U.S., above, at 495, citing Addington, 441 U.S., above, at 430.

Measurement against the other prongs of Mathews brings about a similar result. The "private interest," 424 U.S., above, at 335, affected by governmental action is high; see Point I.B., above. Finally, "the government's interest," id., in not being burdened by additional procedural requirements is minimal; see Point II. B, above. Mathews offers no support to respondents.

are not the "time-consuming procedural minuets" feared in Parham; rather, they are an efficient, inexpensive, and therapeutic means of insuring that patients' substantive constitutional rights are upheld to the benefit of the patients, hospital staffs and society at large.

Amicus agrees that "the desire to help the patient is a laudable if not noble goal." Rogers, 478 F. Supp., above, at 1369. This desire, however, must be implemented in a way which acknowledges that the hospitalized patient is no longer, in the words of District of Columbia Circuit Judge Patricia Wald, "someone to whom attention need not be paid," Wald, "Basic Personal and Civil Rights," in Kindred et al., The Mentally Retarded Citizen and the Law 3, 18 (1976).

"'Equal access to justice' is the cornerstone of the American judicial system."[45] Only through the provision of procedural due process to hospitalized patients at risk in cases like Mills can this "equal access" even become a reality. With regard to the relationship between the Constitution, these drugs and the need for due process in drug use, New Jersey District Court Judge Stanley Brotman described the role of the Constitution in this area in these simple terms:

> Medicine has not yet found a cure for the terrible pain of mental illness. The law cannot assist in this endeavor. But the constitution can and does

---

[45] 4 App., Task Panel Reports, above, at 1366, quoting Herr, Advocacy Under the Developmental Disabilities Act 88 (1976).

prevent those who have suffered so much at the hands of nature from being subjected to further suffering at the hands of man.[46]

CONCLUSION

For the reasons stated above, amicus urges the Court to affirm the judgment of the First Circuit Court of Appeals.

Respectfully submitted,

STANLEY C. VAN NESS
PUBLIC ADVOCATE
Department of the Public Advocate
520 East State Street
Trenton, New Jersey 08625
(609) 292-1780
Attorney for Amicus Curiae

MICHAEL L. PERLIN
Director
John J. Ensminger
J. Benedict Centifanti
Law Clerk
Division of Mental Health Advocacy
Department of the Public Advocate
428 East State Street
Trenton, New Jersey 08625

Date: December 29, 1981

---

[46] Rennie, 476 F. Supp., above, at 1309.

APPENDIX A

STATE OF NEW JERSEY:
:
COUNTY OF MERCER :

Arthur Rosenberg, being of full age and duly sworn according to law upon his oath, deposes and says that:

1. I am an Assistant Deputy Public Advocate in the Department of the Public Advocate, Trenton Field Office of the Division of Mental Health Advocacy, involved in the representation of individual patients.

2. I have been representing patients in this capacity for 2½ years and represent approximately 50 patients a month.

3. I have frequent contact with treating physicians who usually testify at the commitment hearings of their patients.

4. My assignment includes representing patients in commitment and review of commitment hearings and of handling patient complaints, including questions

about drugs and their effects. This sometimes involves explaining to patients their rights as to refusal of suggested medications.

5. I have had a number of clients who have had hearings pursuant to the order in the case of Rennie v. Klein, 476 F. Supp. 1294 (D.N.J. 1979) mandating an independent psychiatric review of hospital requests for involuntary medication of non-consenting patients.

6. I have attended three such hearings. They lasted respectively twenty minutes, forty-five minutes and an hour and a half. Information from clients and hospital staff members indicates to me that they rarely last over half an hour.

Arthur Rosenberg

Sworn and subscribed to before
me this 21st day of December, 1981

Mary E. Sylton
Notary Public of N.J.
My Commission Expires Oct. 12, 1984

STATE OF NEW JERSEY:
:
COUNTY OF MERCER :

Patrick Reilly, being of full age and duly sworn according to law, upon his oath, deposes and says:

1. I am the Chief Field Representative of the Division of Mental Health Advocacy, Department of the Public Advocate in the State of New Jersey and have been a field representative in the office since the inception of the Department in 1974.

2. In this capacity, I supervise a staff of 18 field representatives variously trained as psychologists, social workers, nurses and experienced laymen.

3. My staff is responsible for receiving and processing patient complaints and preparing commitment and other cases for the attorneys of the Division.

4. In my position, I have certain responsibilities for examining and gathering

data from the monthly reports provided to the District Court in New Jersey for evaluation of the medication review hearings mandated by the court.

5. I have extrapolated the data on the number of independent psychiatric reviews from these reports and provided them to Craig Rodine of the Advanced Computer Techniques Corporation in New York City for statistical evaluation. He used this data to prepare the graph appended to his affidavit.

6. In the period of twenty-two months for which data is available from January, 1980 to October, 1981, there have been 105 independent psychiatric medication-review hearings.

7. I have tabulated the number of first emergency certificates signed at all the hospitals (allowing involuntary

medication for 72 hours in emergency cases) and the figure for twenty-two months, from February, 1980, through November, 1981, comes to 4,179 certificates. The number of second emergency certificates (allowing medication for the same period) amounted to 615. The figures as to the individual hospitals are as follows:

	1st	2nd
Glen Gardner	18	7
Greystone	177	17
Trenton	723	52
Marlboro	2,438	500
Ancora	823	39
TOTALS	4,179	615

8. The reports indicate that there has never been any difficulty finding non-affiliated psychiatrists for independent review hearings at three of the five psychiatric facilities covered by the District

Court's order, namely: Glen Gardner, Trenton Psychiatric and Greystone Park Psychiatric. Though there was some difficulty at first finding psychiatrists for the two rural hospitals of Marlboro Psychiatric and Ancora Psychiatric, this has been resolved. A report submitted to the District Court for January, 1980, indicates that eight psychiatrists had submitted applications for the program before it was even implemented.

9. The Greystone Park Psychiatric Hospital monthly report provided the District Court for January, 1981, states; "3i. Staff Morale: Since we have lived with the Rennie vs. Klein decision for over a year now, staff have adjusted and no serious morale problems attributable to the decision exist at this time."

10. On December 18, 1981 I visited the U.S. District Court at Camden, New Jersey in order to examine the set of monthly reports filed there by the New Jersey Department of Human Services. I compared the court set of reports with the reports which the Public Advocate had received and determined that both sets of the reports and the data contained therein were identical and complete.

11. The patient advocates hired by the Department of Human Services have occasional contact with me and my staff. I am aware from personal observation that these patient advocates have responsibilities aside from those stemming from medication-review procedures. This is also noted in monthly reports, such as the portion of the report for May, 1980 written by Virginia Harris.

Patrick Reilly

Patrick Reilly

Sworn and subscribed
before me this 23rd
day of December, 1981

Elaine M. Wieczkowski

Elaine M. Wieczkowski
Notary Public of N.J.
My commission expires 10/28/85

STATE OF NEW YORK :
: ss.
COUNTY OF NEW YORK:

Craig Rodine, being of full age and duly sworn according to law upon his oath deposes and says:

1. I am a senior consultant in software development and applications for the Advanced Computer Techniques Corporation, 437 Madison Avenue, New York City, and am experienced in statistical programming.

2. I have analyzed the statistical data provided me by Mr. Reilly of the Department of the Public Advocate concerning the number of independent psychiatric reviews conducted in the State of New Jersey in the last twenty-two months in the five state mental hospitals. I have used standard data analysis techniques to describe the trend of the data in that period to

produce the attached graph, appended as my Exhibit 1.

3. The data provided indicates that in this twenty-two month period there has been a constant rate of decrease in the number of hearings conducted, according to standard statistical curve-fitting techniques.

Craig Rodine

Sworn and subscribed
to before me this
19 day of
December, 1981.

JOSEPH VIAU
NOTARY PUBLIC, State of New York
No. 31-4508670
Qualified in New York County
Commission Expires March 30, 1983

EXHIBIT 1 3C

GRAPH OF

NUMBER OF INDEPENDENT PSYCHIATRIC REVIEWS
IN
FIVE NEW JERSEY STATE PSYCHIATRIC HOSPITALS:

TIME IN MONTHS, JANUARY 1980 - OCTOBER 1981